

**General Docket
United States Court of Appeals for the Ninth Circuit**

Court of Appeals Docket #: 17-16560

Docketed: 08/07/2017
Termed: 12/21/2018

Nature of Suit: 2895 Freedom of Information Act of 1974

Sierra Club, Inc. v. U.S. Fish and Wildlife Serv., et al

Appeal From: U.S. District Court for Northern California, San Francisco

Fee Status: USA - No Fee Req

Case Type Information:

- 1) civil
- 2) united states
- 3) null

Originating Court Information:

District: 0971-3 : [3:15-cv-05872-EDL](#)

Trial Judge: Elizabeth D. Laporte, Magistrate Judge

Date Filed: 12/21/2015

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
07/24/2017	07/24/2017	08/04/2017	08/04/2017

Prior Cases:

None

Current Cases:

None

SIERRA CLUB, INC.
Plaintiff - Appellee,

Reed W. Super, Esquire, Attorney
Direct: 212-242-2273
[COR NTC Retained]
Super Law Group, LLC
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Suite 603
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v.

UNITED STATES FISH AND WILDLIFE SERVICE
Defendant - Appellant,

Wendy Marie Garbers, Esquire, Attorney
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Thomas G. Pulham, Attorney
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NATIONAL MARINE FISHERIES SERVICE
Defendant - Appellant,

Wendy Marie Garbers, Esquire, Attorney
Direct: 415-436-6475
[COR LD NTC Assist US Attorney]
(see above)

Samantha Lee Chaifetz, Attorney
Direct: 202-514-4821
[COR NTC Government]
(see above)

Thomas G. Pulham, Attorney
[COR NTC Government]
(see above)

UNION OF CONCERNED SCIENTISTS
Amicus Curiae,

Shaun Goho
[COR LD NTC Retained]
Emmett Environmental Law and Policy Clinic
6 Everett St.
Cambridge, MA 02138

SIERRA CLUB, INC.,

Plaintiff - Appellee,

v.

UNITED STATES FISH AND WILDLIFE SERVICE; NATIONAL MARINE FISHERIES SERVICE,

Defendants - Appellants.

08/07/2017	<u>1</u> 16 pg, 1.08 MB	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 08/14/2017. Appellants National Marine Fisheries Service and United States Fish and Wildlife Service opening brief due 11/13/2017. Appellee Sierra Club, Inc. answering brief due 12/13/2017. Appellant's optional reply brief is due 21 days after service of the answering brief. [10534748] (RT) [Entered: 08/07/2017 09:36 AM]
08/09/2017	<u>2</u> 2 pg, 78.04 KB	Filed (ECF) notice of appearance of Thomas Pulham for Appellants NMFS and United States Fish and Wildlife Service. Date of service: 08/09/2017. [10539004] [17-16560] (Pulham, Thomas) [Entered: 08/09/2017 02:30 PM]
08/09/2017	3	Added attorney Thomas G. Pulham for NMFS United States Fish and Wildlife Service, in case 17-16560. [10539142] (JFF) [Entered: 08/09/2017 03:31 PM]
08/17/2017	<u>4</u> 2 pg, 187.64 KB	MEDIATION ORDER FILED: The court of appeals' records do not indicate that appellant has filed a mediation questionnaire in accordance with Cir. R. 3-4. Within seven (7) days of the filing date of this order, appellant shall file a Mediation Questionnaire...dismiss the appeal voluntarily... or show cause in writing why this appeal should not be dismissed. Failure to comply with this order will result in dismissal pursuant to Ninth Cir. R. 42-1. [10549498] (LW) [Entered: 08/17/2017 04:52 PM]
08/18/2017	<u>5</u> 2 pg, 78.03 KB	Filed (ECF) notice of appearance of Matthew Collette for Appellants NMFS and United States Fish and Wildlife Service. Date of service: 08/18/2017. [10550287] [17-16560] (Pulham, Thomas) [Entered: 08/18/2017 12:14 PM]
08/18/2017	<u>6</u> 2 pg, 78.41 KB	Filed (ECF) notice of appearance of Samantha Chaifetz for Appellants NMFS and United States Fish and Wildlife Service. Date of service: 08/18/2017. [10550301] [17-16560] (Pulham, Thomas) [Entered: 08/18/2017 12:19 PM]
08/18/2017	<u>7</u> 3 pg, 28.35 KB	Filed (ECF) Appellants NMFS and United States Fish and Wildlife Service Mediation Questionnaire. Date of service: 08/18/2017. [10550337] [17-16560] (Pulham, Thomas) [Entered: 08/18/2017 12:38 PM]
08/18/2017	8	Added attorney Matthew M. Collette, Samantha Lee Chaifetz for NMFS United States Fish and Wildlife Service, in case 17-16560. [10550482] (JFF) [Entered: 08/18/2017 01:54 PM]
08/22/2017	<u>9</u> 2 pg, 196.47 KB	MEDIATION ORDER FILED: This case is NOT SELECTED for inclusion in the Mediation Program. Counsel may contact circuit mediator to discuss services available through the court's mediation program, to request a settlement assessment conf, or to request a stay of the appeal for settlement purposes. Also, upon agreement of the parties, the brfing sch can be modified or vacated to facilitate settlement discussions. Csl are requested to send copies of this order to their clients. Info regarding the mediation program may be found at www.ca9.uscourts.gov/mediation. [10554063] (VS) [Entered: 08/22/2017 03:17 PM]
09/21/2017	<u>10</u> 2 pg, 107.22 KB	Filed (ECF) notice of appearance of Reed W. Super for Appellee Sierra Club, Inc.. Date of service: 09/21/2017. [10588824] [17-16560] (Super, Reed) [Entered: 09/21/2017 09:05 AM]
09/21/2017	11	Added attorney Reed W. Super for Sierra Club, Inc.. [10589437] (JFF) [Entered: 09/21/2017 02:04 PM]
09/21/2017	<u>12</u> 41 pg, 525.7 KB	Filed (ECF) Appellee Sierra Club, Inc. Unopposed Motion to expedite case. Date of service: 09/21/2017. [10589715] [17-16560] (Super, Reed) [Entered: 09/21/2017 03:17 PM]
09/26/2017	<u>13</u>	Filed clerk order (Deputy Clerk: LK): Appellee's unopposed motion (Docket Entry No. <u>12</u>) to expedite is granted. This case will be calendared as soon as possible upon

017	2 pg, 33.99 KB	completion of briefing. The opening brief is due October 13, 2017; the answering brief is due November 13, 2017; and the optional reply brief is due within 21 days after service of the answering brief. The parties shall refrain from seeking any streamlined extension of time to file a brief. Any motion for an extension of time to file a brief pursuant to Ninth Circuit Rule 31-2.2(b) shall be accompanied by a showing of compelling circumstances. [10594316] (OC) [Entered: 09/26/2017 10:46 AM]
10/13/2017	14 37 pg, 205.67 KB	Submitted (ECF) Opening Brief for review. Submitted by Appellants NMFS and United States Fish and Wildlife Service. Date of service: 10/13/2017. [10617893] [17-16560] (Pulham, Thomas) [Entered: 10/13/2017 04:54 PM]
10/13/2017	15 130 pg, 7.06 MB	Submitted (ECF) excerpts of record. Submitted by Appellants NMFS and United States Fish and Wildlife Service. Date of service: 10/13/2017. [10617902] [17-16560] (Pulham, Thomas) [Entered: 10/13/2017 04:58 PM]
10/17/2017	16 2 pg, 186.77 KB	Filed clerk order: The opening brief [14] submitted by NMFS and United States Fish and Wildlife Service is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. The Court has reviewed the excerpts of record [15] submitted by NMFS and United States Fish and Wildlife Service. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [10620197] (SML) [Entered: 10/17/2017 09:43 AM]
10/20/2017	17	Filed 4 paper copies of excerpts of record [15] in 2 volume(s) filed by Appellants NMFS and United States Fish and Wildlife Service. [10625297] (SML) [Entered: 10/20/2017 10:33 AM]
10/20/2017	18	Received 7 paper copies of Opening Brief [14] filed by NMFS and United States Fish and Wildlife Service. [10626122] (DB) [Entered: 10/20/2017 02:46 PM]
11/13/2017	19 71 pg, 429.22 KB	Submitted (ECF) Answering Brief for review. Submitted by Appellee Sierra Club, Inc.. Date of service: 11/13/2017. [10651212] [17-16560] (Super, Reed) [Entered: 11/13/2017 12:14 PM]
11/13/2017	20 285 pg, 15.86 MB	Submitted (ECF) supplemental excerpts of record. Submitted by Appellee Sierra Club, Inc.. Date of service: 11/13/2017. [10651244] [17-16560] (Super, Reed) [Entered: 11/13/2017 12:27 PM]
11/13/2017	21 2 pg, 186.76 KB	Filed clerk order: The answering brief [19] submitted by Sierra Club, Inc. is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. The Court has reviewed the supplemental excerpts of record [20] submitted by Sierra Club, Inc.. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [10651457] (SML) [Entered: 11/13/2017 02:02 PM]
11/17/2017	22	Received 7 paper copies of Answering Brief [19] filed by Sierra Club, Inc.. [10658751] (RG) [Entered: 11/17/2017 12:27 PM]
11/17/2017	23 1 pg, 455.17 KB	Received Appellee Sierra Club, Inc. supplemental excerpt of record [20] in 1 volume. Deficiencies: excerpts of record pages are double-sided. Notified counsel (see attached

notice). [10658975] (SML) [Entered: 11/17/2017 01:37 PM]

11/20/2017 [24](#)
35 pg, 155.24 KB

Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Union of Concerned Scientists. Date of service: 11/20/2017. [10661177] [17-16560]--[COURT UPDATE: Attached corrected brief. 11/21/2017 by SLM] (Goho, Shaun) [Entered: 11/20/2017 01:59 PM]

11/20/2017 [25](#)
5 pg, 81.5 KB

Filed (ECF) Appellants United States Fish and Wildlife Service and NMFS Unopposed Motion to extend time to file Reply brief until 12/18/2017. Date of service: 11/20/2017. [10661539] [17-16560] (Pulham, Thomas) [Entered: 11/20/2017 03:44 PM]

11/21/2017 26

Entered appearance of Amicus Curiae Union of Concerned Scientists. [10663764] (SML) [Entered: 11/21/2017 05:21 PM]

11/21/2017 [27](#)
2 pg, 186.38 KB

Filed clerk order: The amicus brief [\[24\]](#) submitted by Union of Concerned Scientists is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: green. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. [10663767] (SML) [Entered: 11/21/2017 05:22 PM]

11/22/2017 [28](#)
1 pg, 183.03 KB

Filed clerk order (Deputy Clerk: amt): Granting unopposed (ECF Filing) motion [\[25\]](#) to extend time to file the reply brief. The optional reply brief is due December 18, 2017. [10664691] (AT) [Entered: 11/22/2017 12:43 PM]

11/22/2017 29

Received corrected deficiency of single-sided paper copies of the supplemental excerpts of record from Appellee Sierra Club, Inc. [10665150] (KWG) [Entered: 11/22/2017 02:57 PM]

11/22/2017 30

Filed 4 paper copies of supplemental excerpts of record [\[20\]](#) in 1 volume(s) filed by Appellee Sierra Club, Inc.. [10665155] (KWG) [Entered: 11/22/2017 02:58 PM]

11/27/2017 31

Received 7 paper copies of Amicus Brief [\[24\]](#) filed by Union of Concerned Scientists. [10670183] (DB) [Entered: 11/28/2017 03:20 PM]

12/04/2017 32

This case is being considered for an upcoming oral argument calendar in San Francisco

Please review the San Francisco sitting dates for March 2018 and the two subsequent sitting months in that location at http://www.ca9.uscourts.gov/court_sessions. If you have an unavoidable conflict on any of the dates, please inform the court *within 3 days of this notice*, using CM/ECF (**Type of Document:** File Correspondence to Court; **Subject:** regarding availability for oral argument).

When setting your argument date, the court will try to work around unavoidable conflicts; the court is not able to accommodate mere scheduling preferences. You will receive notice that your case has been assigned to a calendar approximately 10 weeks before the scheduled oral argument date.

If the parties wish to discuss settlement before an argument date is set, they should jointly request referral to the mediation unit by filing a letter *within 3 days of this notice*, using CM/ECF (**Type of Document:** File Correspondence to Court; **Subject:** request for mediation).[10676943] (AW) [Entered: 12/04/2017 02:13 PM]

12/18/2017 [33](#)
34 pg, 204.73 KB

Submitted (ECF) Reply Brief for review. Submitted by Appellants NMFS and United States Fish and Wildlife Service. Date of service: 12/18/2017. [10694682] [17-16560] (Pulham,

12/18/2017 [34](#)
2 pg, 186.3 KB

Filed clerk order: The reply brief [\[33\]](#) submitted by NMFS and United States Fish and Wildlife Service is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. [\[10694739\]](#) (SML) [Entered: 12/18/2017 03:17 PM]

12/20/2017 35

Received 7 paper copies of Reply Brief [\[33\]](#) filed by NMFS and United States Fish and Wildlife Service. [\[10697473\]](#) (RG) [Entered: 12/20/2017 11:56 AM]

01/03/2018 36

Notice of Oral Argument on Thursday, March 15, 2018 - 09:30 A.M. - Courtroom 3 - San Francisco CA.

View the Oral Argument Calendar for your case [here](#).

Be sure to review the [GUIDELINES](#) for important information about your hearing, including when to arrive (30 minutes before the hearing time) and when and how to submit additional citations (filing electronically as far in advance of the hearing as possible).

When you have reviewed the calendar, download the [ACKNOWLEDGMENT OF HEARING NOTICE form](#), complete the form, and file it via Appellate ECF or return the completed form to: SAN FRANCISCO Office.

[\[10710782\]](#) (AKM) [Entered: 01/03/2018 10:32 AM]

01/08/2018 [37](#)
1 pg, 51.99 KB

Filed (ECF) Acknowledgment of hearing notice. Location: San Francisco. Filed by Attorney Mr. Reed W. Super, Esquire for Appellee Sierra Club, Inc.. [\[10715543\]](#) [\[17-16560\]](#) (Super, Reed) [Entered: 01/08/2018 08:19 AM]

01/08/2018 [38](#)
1 pg, 51.59 KB

Filed (ECF) Acknowledgment of hearing notice. Location: San Francisco. Filed by Attorney Mr. Thomas G. Pulham for Appellants NMFS and United States Fish and Wildlife Service. [\[10717189\]](#) [\[17-16560\]](#) (Pulham, Thomas) [Entered: 01/08/2018 03:54 PM]

02/05/2018 [39](#)
1 pg, 256.47 KB

Filed clerk order (Deputy Clerk: OC): Defendants-Appellants are directed to submit the twelve documents that the district court held, after in camera review, must be disclosed in full or in part (NMFS 44516.1, FWS 252, NMFS 5427.1, FWS 279, FWS 308, FWS 555, NMFS 61721, NMFS 5597.1, NMFS 7544.2, NMFS 37695, NMFS 37667, NMFS 14973.1) for review by this Court in camera and under seal using the event "Notice of Filing Document under Seal and Submit Sealed Document." [\[10751723\]](#) (OC) [Entered: 02/05/2018 01:56 PM]

02/13/2018 40

Filed (ECF) IN CAMERA and UNDER SEAL Appellants NMFS and United States Fish and Wildlife Service notice of filing document under seal. Type of document: other (Documents requested by the Court's Order of February 5, 2018.). Date of service: 02/13/2018. [\[10762960\]](#) [\[17-16560\]](#) (Pulham, Thomas) [Entered: 02/13/2018 04:15 PM]

02/13/2018 41

Filed IN CAMERA and UNDER SEAL Appellants NMFS and United States Fish and Wildlife Service exhibits requested by the Court's Order of February 5, 2018. Served on 02/13/2018 (Document previously submitted in [\[40\]](#)). [\[10763033\]](#) (SML) [Entered: 02/13/2018 04:38 PM]

03/15/2018 42

ARGUED AND SUBMITTED TO J. CLIFFORD WALLACE, MARSHA S. BERZON and TERRENCE BERG. [\[10800013\]](#) (Learned, Glen) [Entered: 03/15/2018 02:23 PM]

03/15/2018 [43](#)

Filed Audio recording of oral argument.

018	1 pg, 17.51 MB	Note: Video recordings of public argument calendars are available on the Court's website, at http://www.ca9.uscourts.gov/media/ [10801959] (DO) [Entered: 03/16/2018 02:33 PM]
08/03/2018	44 37 pg, 375.02 KB	Filed (ECF) Appellants NMFS and United States Fish and Wildlife Service citation of supplemental authorities. Date of service: 08/03/2018. [10964930] [17-16560] (Pulham, Thomas) [Entered: 08/03/2018 09:38 AM]
08/10/2018	45 78 pg, 516.61 KB	Filed (ECF) Appellee Sierra Club, Inc. citation of supplemental authorities. Date of service: 08/10/2018. [10973071] [17-16560] (Super, Reed) [Entered: 08/10/2018 11:20 AM]
10/24/2018	46 2 pg, 57.63 KB	Filed (ECF) Appellants NMFS and United States Fish and Wildlife Service Correspondence: Notice of Withdrawal of Counsel Matthew M. Collette. Date of service: 10/24/2018 [11058903] [17-16560] (Collette, Matthew) [Entered: 10/24/2018 02:56 PM]
10/24/2018	47	Terminated Matthew M. Collette for United States Fish and Wildlife Service and NMFS. [11058983] (RL) [Entered: 10/24/2018 03:14 PM]
12/03/2018	48	Filed SEALED order (J. CLIFFORD WALLACE, MARSHA S. BERZON and TERRENCE BERG) (SEE ORDER FOR FULL TEXT). All counsel served via email. [11106444] (RMM) [Entered: 12/03/2018 09:47 AM]
12/06/2018	49	Filed (ECF) UNDER SEAL Appellee Sierra Club, Inc. motion to file document under seal and submit sealed document. Type of document: other (Letter). Date of service: 12/06/2018. [11112559] [17-16560] --[COURT UPDATE: Attached corrected motion and brief. 12/7/2018 by TYL] (Super, Reed) [Entered: 12/06/2018 02:02 PM]
12/07/2018	50 3 pg, 113.19 KB	Filed Appellee Sierra Club, Inc. motion to file document UNDER SEAL. Deficiencies: None. Served on 12/06/2018. (Court entered filing, originally submitted in [49]) [11113448] (KWG) [Entered: 12/07/2018 08:42 AM]
12/07/2018	51	Submitted (ECF) UNDER SEAL Letter Brief for review. Submitted by Appellee Sierra Club, Inc.. Date of service: 12/06/2018. (Court-entered filing, brief originally submitted in [49].) [11113470] (KWG) [Entered: 12/07/2018 08:47 AM]
12/21/2018	52 1 pg, 191.25 KB	Filed order (J. CLIFFORD WALLACE, MARSHA S. BERZON and TERRENCE BERG) Plaintiff-Appellee's motion to seal its letter brief is granted. [11129668] (OC) [Entered: 12/21/2018 08:56 AM]
12/21/2018	53 45 pg, 414.2 KB	FILED OPINION (J. CLIFFORD WALLACE, MARSHA S. BERZON and TERRENCE BERG) For the foregoing reasons the district court's order to produce the December 2013 draft jeopardy biological opinions (NMFS 44516.1 and FWS 252), the March 2014 RPA (FWS 555), and the remaining statistical and instructional documents (NMFS 5597.1, NMFS 61721, NMFS 7544.2, NMFS 37695, NMFS 37667, NMFS 14973.1) is AFFIRMED because the record shows that these materials are not both pre-decisional and deliberative and therefore not exempt under 522(b)(5) of FOIA, Exemption 5. The district court's order to produce the December 2013 RPAs (FWS 279, 308) and the April 2014 draft jeopardy opinion (NMFS 5427.1) is REVERSED because these materials are both pre-decisional and deliberative and thus exempt from disclosure under FOIA Exemption 5. The parties agree that reversal would require the district court to perform a segregability analysis on remand. We instruct the district court to perform that analysis. The case is REMANDED for further proceedings consistent with this opinion. Opinion by Judge Berg; Partial Concurrence and Partial Dissent by Judge Wallace. FILED AND ENTERED JUDGMENT. [11129820] (MM) [Entered: 12/21/2018 09:33 AM]
12/21/2018	54	Filed clerk order: The letter brief [51] submitted by Sierra Club, Inc. is filed UNDER SEAL.

018	1 pg, 182.26 KB	No paper copies are required at this time. [11129983] (KWG) [Entered: 12/21/2018 10:23 AM]
12/21/2018	55 1 pg, 11.57 KB	Filed clerk order (Deputy Clerk: MM): At the direction of the Court, the parties shall bear their own costs. [11131184] (MM) [Entered: 12/21/2018 02:47 PM]
